



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL SUIT NO. 223 OF 2010

KLAUS JURGEN THIELE.....1ST PLAINTIFF

INGE THIELE.....2ND PLAINTIFF

VERSUS

JOSEPH MUYA NJURU.....1ST DEFENDANT

HILDA WANJIKU MUYA.....2ND DEFENDANT

SAMUEL WARURU.....3RD DEFENDANT

JOSEPH MUCHERU KURIA.....4TH DEFENDANT

LUCY NJERI KABUE.....5TH DEFENDANT

ATANUS MWANGI KAMAU.....6TH DEFENDANT

GRACE WANJIRU GICHANGA.....7TH DEFENDANT

LAKE NAKURU LODGE LIMITED.....8TH DEFENDANT

SUMMERSET INVESTMENTS LIMITED.....9TH DEFENDANT

JOSSAM LIMITED.10TH DEFENDANT

GEOFFREY KAHUNGU.....11TH DEFENDANT

RULING

This action was brought by the two plaintiffs against all the eleven (11) defendants claiming reimbursement of Kshs.9,059,269/= being money had and received for some failed business ventures. The defendants have not only denied the claim but are also seeking in the present summons that

the plaintiffs do provide within fourteen (14 days) security for their (defendants') costs in the sum of Kshs.5m. It is averred that the plaintiffs being residents of Germany and the likelihood of the claim against most of the defendants failing, the defendants are apprehensive that the plaintiffs will be unwilling and/or unable to pay the formers' costs; that the plaintiffs have no known assets in Kenya; that the defendants are liable to spend substantial sums of money on this litigation.

In reply, the plaintiffs have confirmed that are residents of Germany. They have, however, submitted that provision of security for costs is a discretionary matter; that their claim is not statute-burred; that no basis has been laid for the sum of Kshs.5m sought as security in this application.

I have weighed these arguments and the authorities cited by both sides. The proposition gleaned from these authorities may be summarized thus:

- i) the discretion to order or not to order for security is unfettered but must be exercised reasonably and judicially;
- ii) as a general rule, security would be required of plaintiffs who ordinarily are not residents of this court's jurisdiction;
- iii) the test on an application for security for costs is whether the defendant has a *bona fide* defense;
- iv) the order of security will be made if it is necessary for the protection of the defendant;
- v) the ability or inability or even the likelihood of the plaintiffs to pay the defendants costs is a consideration

See:

- i) **Shakhalaga Khwa Jirongo V. Board of Trustees, NSSF**, HCCC Civil Suit No.957 of 2000.
- ii) **Menno Travel Services Ltd. V. Co-operative Bank of Kenya Ltd**, HCCC No 421 of 2006.
- iii) **Lonhro Motors EA Ltd. V. Insurance Company of E.A.**, HCCC No184 of 2003.
- iv) **Pancrast T. Swai V Kenya Breweries Ltd**, HCCC No.1190/1994
- v) **Shah V. Shah**(1982) KLR Halsbury's Law of England 4th Edition Vol. 37.

It is common ground that both plaintiffs reside and work for gain in Germany. They have brought this action against the defendants. I have looked at both the plaint and the defence and found there are triable issues in the action. The plaintiffs, although foreigners, have not demonstrated that they own property within the limits of this court's jurisdiction. The defendants' apprehension is not without basis.

For these reasons, it is ordered that the plaintiffs shall, within sixty (60) days from the date of this order, deposit it an interest generating account with a reputable bank in the joint names of their counsel and counsel for the defendants Kshs.1,000,000/= . Pending this, these proceedings are accordingly stayed.

I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 27th day of January, 2012.

W. OUKO

JUDGE